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IN THE

Supreme Court of the United States

October Term, 1933

No. 505

MANHATTAN PROPERTIES, INC., *Petitioner*,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD, *Petitioners*,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF MARY P. HALE, CLARISSA HALE STUDDERT-KENNEDY, AND STERLING FURNITURE COMPANY, AS *AMICI CURIAE*.

The *Amici Curiae* are landlords having claims in the bankruptcy of F. & W. Grand 5-10-25 Cent Stores, Inc., a chain store corporation now in bankruptcy in the United States District Court for the Southern District of New York. They file this brief in support of the petitioners herein.

POINT I.

The petitioners' claims are susceptible of valuation by methods familiar in liquidation proceedings and in cases of anticipatory breach of contract, viz., by determining the present value of the contract. *Hermitage Co.* v. *Levine*, 248 N. Y. 333, is not applicable.

We do not understand that the respondent argues that the difference between rent reserved and reasonable rental value is incapable of being ascertained. The respondent challenges, rather, the right of the petitioners to evaluate their claims on that basis, and contends that they are entitled only to prove for instalments of rent which were overdue when the petition in bankruptcy was filed.

This argument disregards the fact that the standard and accepted method of evaluating a claim on a defaulted forward contract is to take the present value of the contract as the measure of loss. This is true both in liquidation proceedings, that is, in bankruptcy and in equity administration suits, and also in actions for anticipatory breach of contract.

This Court so held in an early case, *Carr* v. *Hamilton*, 129 U. S. 252. There the Court had occasion to consider the effect of the bankruptcy (under state law) of a life insurance company upon its outstanding policies. It said (p. 256):

> "By that act [of becoming bankrupt] the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies * * *."

The holding therefore was that a policyholder *had a then existing claim for the present value of his policy* against the liquidating agent of the insurance company. It was not necessary to wait on future events in order to liquidate the claim. To the same effect is *Lovell* v. *St. Louis Life Insurance Co.*, 111 U. S. 264, 274. Both these cases were cited with approval by this Court in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581, at page 589.

Furthermore, the decisions clearly hold that the present value of a forward contract must be determined by the difference between the amounts of payment reserved by the contract and the amounts of similar payments under a similar contract based on present current market values. Thus, in *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734, the Circuit Court of Appeals for the Second Circuit, in discussing the amount provable in an equity receivership proceeding by a claimant who had been deprived by the defendant's insolvency of a forward contract, said (p. 738):

> "The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920 [the date of the appointment of Receivers]? And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract."

The way the rule works is illustrated by another case, involving the bankruptcy of a seller of ice, where the market value of forward deliveries under a long-term instalment contract had increased. In *In re Stern*, 116 Fed.

604, the Circuit Court of Appeals for the Second Circuit considered whether the buyer had a provable claim against the defaulting seller in bankruptcy. It said (p. 608):

> "* * * petitioners could not replace the contract without suffering a direct loss much in excess of $500, and * * * were creditors for the requisite amount, and were not obliged to await the expiration of the time for which the contracts were to continue."

This Court cited the *Stern* case with approval in the *Chicago Auditorium* case, and also the case of *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721. In this last case, an equity receivership proceeding, the Circuit Court of Appeals for the Second Circuit held that the loss of an advantageous contract to operate express cars over the lines of the insolvent defendant street railway company for thirteen years in the future was provable, and stated its measure as follows: "Manifestly the claimant was entitled to recover the value of its contract" (p. 745).

The rule is analogous to, if not derived from, the method of ascertaining damages in actions based upon anticipatory breach of contract, as the method was set forth by this Court in *Rochm* v. *Horst*, 178 U. S. 1, at page 21:

> "Even if in such cases the manufacturer [the seller] actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle applies and he may show what was the value of the contract by showing for what price he could have made subcontracts, * * *

> "In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."

In the numerous cases in which creditors have been allowed to prove damages for the loss of advantageous forward contracts, present value of future performance has necessarily been the standard of measure. Thus with respect to proof upon an annuity contract, the provable claim was held to be the present value; for the actual loss depended on future events and was necessarily unknown. *Cobb* v. *Overman*, 109 Fed. 65 (C. C. A., 4th Circ.).

In the *Chicago Auditorium* case, this Court held, as we read the opinion, that the measure of loss is the difference between the contract amount and market value.

This Court in *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597, applied this doctrine to the evaluation of the loss of an advantageous lease, by holding that a covenant to pay the difference between rent reserved and rental value "was a personal covenant that liquidated the damages upon a footing that was familiar and fair." (245 U. S. 602).

As a matter of logic, the present value of a covenant to indemnify against loss would be the same as the value of the covenant considered in the *Filene* case. This Court recognized that fact in the *Filene* case itself by citing, as an illustration of the "familiar and fair" basis for liquidating the loss, the case of *Reading Iron Works—Sweatman's Appeal*, 150 Pa. St. 369. There the Pennsylvania Court held that a landlord whose lease contained a covenant of indemnity against loss upon which the insolvent had defaulted could prove in a liquidation proceeding, saying (p. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated. * * * The demand * * * is for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises and the rental agreed upon * * *."

In the English bankruptcy courts the same standard is applied. *Ex parte Llynvi Coal & Iron Co., In re Hide,* L. R. 7 Ch. App. 28.

When a landlord defaults upon a covenant of quiet enjoyment, it is held in most jurisdictions that

> "* * * recovery may be had at once for the value of the unexpired period of the lease; that is, the difference between the promised rent and the rental value of the term, or the difference between the contract price and the market price * * *" III *Williston, Contracts,* p. 2492.

Professor Williston cites numerous cases as authority for this statement.

The measure of damages for breach of a contract to give a lease is universally held to be the difference between payments reserved and the value of the contract based on the then market rental value. *Oldfield* v. *Angeles Brewing Co.,* 62 Wash. 260. In *Bondy* v. *Harvey,* 218 App. Div. 126, the New York Appellate Division for the First Department recognized the propriety of this method of ascertaining damages for the breach of a contract to give a long-term lease. (It reversed the judgment below on the sole ground that it failed to take into account the fact that distant future payments must be reduced to present-day value before being used for the calculation of damages.) In *Leo* v. *Pearce Stores Co.,* 57 F. (2d) 340, an equity receivership proceeding, the Court made a full and interesting review

of the authorities and arrived at the same standard as the correct measure of damage for the landlord who has lost an advantageous lease.

Hermitage Co. v. Levine Not Applicable.

As authority for the proposition that the provable claim is limited to accrued loss, rather than permitted to include actual loss based upon present value, the respondent relies on *Hermitage Co.* v. *Levine*, 248 N. Y. 333.

That case construed an indemnity clause as imposing a liability only after the expiration of the original term.

Hermitage Co. v. *Levine* was not a liquidation proceeding. *There was no occasion to evaluate future obligations.* The action was brought for instalments alleged to have accrued before the commencement of the action. It was simply a question of the construction of a contract: whether any such instalments had yet accrued; and the particular covenant in question was construed as imposing a delayed, rather than an immediate, liability.

The New York Court was not asked by the plaintiff to set a present value, and did not attempt to set a present value, on the contract. The only question was: under this contract had any obligations yet matured? The present value of a future obligation was in no wise involved.

Assuming that for some reason the New York Court had had occasion to evaluate the present worth of the contract, there is nothing in the opinion to suggest that it would have disagreed with the Pennsylvania Court in the *Reading Iron Works* case when it said (150 Pa. St. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated."

POINT II.

The courts, both in bankruptcy and otherwise, have abundantly recognized the ascertainability of a salvage value to be deducted from the face value of future payments due.

Fundamentally, the question is whether the amount of salvage that the landlord can obtain over the remainder of the lease period is ascertainable. Cases cited under the preceding point have shown that the rental value of real property for periods of years in the future invariably has been regarded as ascertainable. It presents no insuperable obstacle to the working of the judicial process any more than do many other difficult and delicate problems of valuation.

In a number of cases the courts have ascertained present losses by making an appropriate deduction from a contracted payment, to represent salvage value, even though there was in such cases no recognized formula, such as difference between rent reserved and rental value, to guide the computation.

Pension Agreements.

Thus in *Pierce* v. *Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, this Court held that damages for breach of a pension agreement could be ascertained, although saying that "deduction should, of course, be made of any sum that

the plaintiff might have earned in the past or might earn in the future" (173 U. S. 16).

Employment Contracts.

This Court in the *Chicago Auditorium* case cited with approval *Ex parte Pollard*, Fed. Cas. No. 11,252, holding provable in bankruptcy a claim for damages upon breach of an employment contract having eight years to run (240 U. S. 589, 592).

Secured Claims.

Another analogy is afforded by the rules with respect to computing the claims of secured creditors. The land is often spoken of as the landlord's security.

A secured creditor is ordinarily allowed to prove "for such sums only as to the courts seem to be owing over and above the value of their securities" (*Bankruptcy Act*, Sec. 57-e). Now the value that is used in this determination is the present value. If a creditor had a claim secured by mortgage bonds maturing in ten years and presently quoted on the Stock Exchange at, say, 80, the Court would obviously take the market value rather than devote itself to puzzling over whether the bonds would be paid in full at maturity. Similarly the present rental value of premises must be the standard; it is the best and the only standard that there is. It represents society's consensus not only on present conditions but of course on what is deemed likely to happen in the future.

POINT III.

The fact that rent "issues" from the land is not an argument against a claim for damages.

In a number of the early cases in the lower federal courts the landlords filed claims for total unaccrued rent. It was an appropriate argument against the provability of such a claim to advert to the legal principle that rent "issues" from the land, and that as the landlord had reoccupied the land no more rent was due.

But this is no answer, we submit, to a claim for damages for the loss of an advantageous lease.

The landlord is no more entitled to total unaccrued rent than a seller of goods on a forward contract would be entitled to prove for the entire sale price of the goods upon the bankruptcy of the buyer. But in the event that the market value of the goods for future delivery had meanwhile declined, the hypothetical seller could prove for the difference between the sale price and the market price—that is, the value of his contract. The agreed price is the consideration for future sales of goods, precisely as the agreed rent is the consideration for the future possession of land. A landlord should be allowed the same rights in a bankruptcy as a seller of goods.

Conclusion.

The conclusion should be that the claims of the petitioners are provable, not merely because of the presence of special indemnity covenants, but on the broad ground that a landlord's claim is provable in bankruptcy, with or without such clauses, just as is the claim of any other holder of a long-term contract.

Respectfully submitted,

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